

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 30, 2008

**THOMAS W. OVERBAY v. HOWARD CARLTON, WARDEN**

**Appeal from the Criminal Court for Johnson County**  
**No. 5178    Lynn W. Brown, Judge**

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**No. E2008-00147-CCA-R3-HC - Filed December 3, 2008**

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Petitioner, Thomas W. Overbay, was convicted of four counts of aggravated sexual battery and ten counts of rape of a child and sentenced to serve forty-eight years in incarceration. *State v. Thomas Wayne Overbay*, No. E1999-00840-CCA-R3-CD, 2000 WL 1246617 (Tenn. Crim. App., at Knoxville, Sept. 5, 2000), *perm. app. denied*, (Tenn. Apr. 24, 2001). Petitioner subsequently filed a petition for writ of habeas corpus in which he alleged that his judgments were void because his sentences were enhanced with factors solely determined by the trial court in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). We determine that any violation in regard to *Blakely* would merely render Petitioner's convictions voidable, not void. Therefore, the judgment of the habeas corpus court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and CAMILLE R. MCMULLEN, J., joined.

Thomas W. Overbay, Pro Se, Mountain City, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General, and Joe Crumley, District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Petitioner was convicted of four counts of aggravated sexual battery and ten counts of rape of a child in connection with the sexual abuse of his girlfriend's five-year-old daughter. *State v. Thomas Wayne Overbay*, 2000 WL 1246617, at \*2-3. Petitioner's convictions were affirmed on appeal. *Id.* at 10. Petitioner filed a petition for post-conviction relief in which he alleged that "his trial counsel was ineffective because counsel failed to explain the details of a plea offer, failed to explain the release eligibility terms of the plea agreement versus those for the charged offenses, and gave the petitioner an erroneous estimate of the probability of his being convicted." *Thomas Wayne*

*Overbay v. State*, No. E2006-00518-CCA-R3-PC, 2007 WL 283142, at \*1 (Tenn. Crim. App., at Knoxville, Feb. 1, 2007), *perm. app. denied*, (Tenn. May 21, 2007). The denial of post-conviction relief was affirmed by this Court. *Id.* Petitioner subsequently filed a petition for writ of habeas corpus in which he alleged that his judgments were void because his sentences were enhanced with factors solely determined by the trial court in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). Specifically, Petitioner argued that the trial court had “no jurisdiction, power or authority to impose a 48 year sentence, [sic] that was enhanced on factors found to apply solely by the judge.” The habeas corpus court dismissed the petition, determining that “[n]othing in the petition would support a finding by this court that petitioners’ [sic] conviction is void or that his sentence has expired.” Petitioner appeals the dismissal.

On appeal, Petitioner advances the same argument, that his federal constitutional rights were violated when the trial court imposed enhancement factors where the factors were neither found by a jury nor admitted by Petitioner. The State argues that Petitioner’s claim would render the judgment voidable, rather than void, and therefore Petitioner is not eligible for habeas corpus relief.

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court’s findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner’s burden to demonstrate, by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. “A void judgment ‘is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.’ We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal.” *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner’s filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280, 283 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at \* 1 n. 2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v. State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. A habeas corpus court “properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” *Summers*, 212 S.W.3d at 260; *See also Hickman*, 153 S.W.3d at 21.

With regard to Petitioner’s argument that the trial court’s imposition of enhancement factors violated his constitutional rights, this Court has held that *Blakely* violations, in and of themselves, are constitutional violations, but do not render a judgment void. *See Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at \*2-3 (Tenn. Crim. App., at Nashville, May 1, 2007); *James R.W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at \*2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied*, (Tenn. Oct. 10, 2005); *Earl David Crawford v. Ricky Bell*, No. M2004-02440-CCA-R3-HC, 2005 WL 354106, at \*1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005), *perm. app. denied*, (Tenn. June 27, 2005). Because a *Blakely* violation renders a judgment merely voidable as opposed to void, it is not subject to attack through a writ for habeas corpus relief. *See Passarella*, 891 S.W.2d at 627.

Moreover, this Court has also held that *Blakely* does not apply retroactively to cases that have already been finalized on direct appeal and are now the subject of a collateral attack. *See Timothy R. Bowles*, 2007 WL 1266594, at \*3; *James R.W. Reynolds*, 2005 WL 736715, at \*2; *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at \*10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at \*4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005).

Consequently, Petitioner’s issues are without merit.

#### *Conclusion*

For the foregoing reasons, the judgment of the habeas corpus court is affirmed.

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JERRY L. SMITH, JUDGE

